

Equity Examiner's Comments March 2009

General Comments

Overall the exam was reasonably done well but the major failing was in time management. Many were not able to complete the exam in time. Another major failing was in the area of assignments and dispositions. This appears to have been particularly poorly understood.

Question 1 (25 marks)

In his dissenting judgment in *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 Mason P stated at [224]:

Courts have traditionally been bold in such areas, equity particularly so. Equity has always claimed to have the capacity to fashion and mould its remedies to meet the needs of the case. Within its auxiliary jurisdiction, equity intervenes because of the deficiencies and inadequacies of the common law. Why should equity turn coy in its exclusive jurisdiction? Equity is usually noted for its flexibility and boldness, not its timidity. If it is accepted, as I think it must, that the stripping of profits will (on occasions) represent an inadequate means of enforcing common decency, why should equity stand proudly apart from the common law in withholding the discretionary remedy of exemplary damages in an otherwise appropriate case? (references omitted)

Do you think that Equity should be able to expand its remedial range by including common law remedies like exemplary damages? Discuss with reference to caselaw.

This question required the student to actually assess the question and answer it directly. Many saw this as an opportunity to discuss issues at large rather than to directly answer the question. It was easy enough to answer the question by following the lines of argument in *Harris*. Students should have covered the fusion issues as well as the argument put forth by Mason P regarding equity's development.

Question 2

(a) Discuss the effects of the judgment of the High Court in *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22, and its effects on the operation of the rule in *Barnes v Addy* (1874) LR 9 Ch App 244 in the Torrens system of land ownership.

Most students did not answer this question at all, showing that there were unclear as to what the judgment had to offer for the Torrens system. This showed a rather poor understanding of the case and its effects. The main issue was how *Barnes v Addy* claims effect the exceptions to indefeasibility, as discussed in differing lines of authority coming of of *Macquarie Bank, Tara Shire, Kotoorang,* and *LHK Nominees*.

(b) To what extent did the decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* effect the UK courts approaches to knowing receipt as exemplified in case like *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Twinsectra Ltd v Yardley* [2002] 2 AC 164?

This required a discussion of the dishonesty approaches adopted by British cases and how the High Court has moved back to embracing the approach in *Consul Developments*. Overall this was also poorly done by most students.

Question 3

The facts of this question are set in NSW. Dawn was a wealthy industrialist that made her money from inventing castor wheels. Her two main assets were the royalties from two companies (Northcoate Enterprises and Southcoate Industries) that she received for her inventions and a bank account worth \$25 million at the Universal Bank.

Dawn discovered she had motor neurone disease and had a very short life expectancy. She decided to make a gift of her royalties from the two companies in a voluntary deed. The gifts read:

‘My contractual right to receive royalties from Northcoate Enterprises I give to my husband Maxwell. Half of the future royalties from Southcoate Industries to go to my brother Ted.’

When Dawn died her will set out that all her assets should be held on trust by Maxwell for three discretionary beneficiaries. They were her children Christopher (aged 25), Andrew (aged 21), and Kerrie (aged 17). The Trust provided that Maxwell would have the discretion to pay income each year to the beneficiaries from the interest earned on the account. Maxwell was obliged in the trust deed to distribute all the income every year but he could choose to whom it was distributed. The Trust also gave Maxwell the widest powers to invest the money as he saw fit to get the best return.

After a short time the children became unhappy with Maxwell’s management of the trust. This dispute began when Maxwell took some of the money from the account to reimburse himself for costs spent in getting advice about how to invest the trust funds properly.

The children were also angry at Maxwell’s decision to leave the money with the Universal Bank. The beneficiaries objected to this as the Universal Bank was responsible for environmental degradation in

Western Australia. The beneficiaries preferred the funds to be invested with the Environmental Bank (which has strict environmental policies), even though this would mean that there would be less return on the investment.

Maxwell was worried that the beneficiaries were going call on him to distribute all the funds and terminate the trust. He was unsure of whether the beneficiaries had the power to make that decision. He was also worried that they were going to sue him for the reimbursement monies or force him to invest in the Environmental Bank.

(a) Were the gifts in the voluntary deed effective?

The first gift is similar to *Shephard* and is successful. All these parts deal with whether the property being assigned is present or future property, given that the assignments are for no consideration. Present property can be assigned for no consideration, but not so future property. Students must know *Shepherd* and *Norman* in particular. The key to this type of question is to make clear that there is a distinction between assigning an existing right to receive future property (present property) as opposed to the future property itself. The tree and fruit metaphor is often used. In cases of presently existing rights to future property being assigned it doesn't matter that it may not ever come to fruition, so to speak: See *Shepherd*.

The second fails because it can only be an equitable assignment given it is future property, and it's a voluntary deed.

(b) Did Maxwell breach trust reimbursing himself from the funds?

No. Trustees have a right to be indemnified for costs and expenses incurred in the proper administration of the trust. In exercise of this right the trustee can have recourse to the trust property. According to *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170, trustees have an additional right of exoneration which allows them to draw directly on the trust assets to discharge their duties, as opposed to paying out of their own funds and seeking reimbursement

(c) Can the beneficiaries force him to change investment strategies?

No. Ken's decision to invest in a higher but less ethical bank cannot be overturned because he has a duty to secure the best financial return: *Cowan v Scargill*.

(d) Can the beneficiaries terminate the trust?

Yes. Where there is more than one beneficiary and they are all *sui juris*, legally capable and absolutely entitled, they can all agree to terminate the trust and call for a distribution of trust property: *Gosling v Gosling* (1859) Johns 265; 70 ER 423. Discretionary beneficiaries also have a right to extinguish the trust. In *Sir Moses Montefiore Jewish Home v Howell & Co* (No 7) [1984] 2 NSWLR 406, the beneficiaries were allowed to terminate the trust, but only after it was proven that all the beneficiaries were identified, the class of objects was closed and the trustee was obliged to distribute income every

year. If some, but not all of the beneficiaries are of capacity and *sui juris*, it may be possible for the trustee to allow those who are of age and capacity take their beneficial interest, leaving the remaining trust property. In *Whakatane Paper Mills Ltd v Public Trustee* (1939) SR (NSW) 426 at 400, Long Innes J recognised that the rule allowed a beneficiary to take his or her *aliquot* (divisible or proportionate) share of the trust property.

However, there are two provisos to this rule. The first is that the trust property must be divisible. If the trust property consists of real estate, mortgage debts, or shares in a private company it may be difficult to divide up the beneficiaries' shares until the property is converted: *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 at 647, per Walton J; *Wilson v Wilson* (1951) 51 SR (NSW) 91.

The second proviso is that the proposed division must not have a detrimental effect on the remaining beneficial interests: *In re Horsnail; Womersley v Horsnail* [1909] 1 Ch 631. The question of detrimental effect involves considering the types of property and the interests of the beneficiaries. It does not include consideration of the interests of the trustees but it can take into account the wishes and intentions of the testator, although this seemingly has little weight. Even where property is easily divisible (such as most personalty) the court may refuse to order conversion if the interest of the other beneficiaries is prejudiced. A pragmatic approach is adopted by the courts: *Manfred v Maddrell* (1951) 51 SR (NSW) 95 at 97, per Sugerman J.

QUESTION 4 (25 marks)

The facts in this question occur in NSW. David and Anthony were brothers. They purchased a house together with each providing 50% of the purchase price but David did not want the house to be in his name because he wanted to later access a government scheme for ex-servicemen where they could borrow money of the government for their first house at a cheap rate. David had fought in the Vietnam War with the 6th Battalion. The house was registered in Anthony's name.

David later won the lottery and with the money decided that he would like to provide for his family and friends. He wrote a will which contained the following clauses:

I give \$500,000 to my brother Anthony, on conditions of which he will be made aware.

I give another \$2,000,000 to Anthony which should be used by him for the absolute benefit of the surviving members of D Company 6th Battalion, Royal Australian Regiment, with whom I served in the Vietnam War, their families and their dependents.

I give the residue of my estate to my sister Tracey who may, at her absolute discretion, give such residue to anyone she thinks fit,

barring herself, and Anthony. If Tracey fails to dispose of the residue in her lifetime, it shall become the property of my nephews, Kye, Mitchell and Jordan.

Three days after writing the will David gave a letter to Anthony and asked him to follow the instructions in the letter, but only after he died. Anthony agreed with a wink and wry smile.

David died three months later in a motorcycle accident. Anthony opened the letter and found that it instructed him to track down his illegitimate son, Tom, who was born in Vietnam during David's service, and give the \$500,000 gift to him.

(a) Does David's estate have a claim on the house?

This issue is one concerning a resulting trust set up in a situation of illegality. The facts of this are similar to *Nelson*. The resulting trust will be upheld for David's estate because the policy of the law has not been offended. David's estate may have to reimburse the government for any payments they wrongfully received, on the basis of clean hands

(b) Is the disposition to the members of D Company, their families and dependants effective?

The trust could arguably be an express trust. The issue is one of certainty. It is discretionary but it appears to satisfy *McPhail's* criterion certainty test.

It may also be charitable. Care of soldiers is referred to in *Statute of Charitable Uses* 1601 (43 Eliz I, c.4), which is sometimes referred to as the *Statute of Elizabeth*. So it is prima facie charitable.

However there may be an issue as to whether there is public benefit because the trust is related to employment and blood. The *Compton test* has been used to strike down charitable trusts when the potential recipients of the trust funds have been defined by reference to blood relation, employment or contract: *Re Mills (dec'd)* (1981) 27 SASR 200. For example, a gift to a school exclusively for the children of Masons was found to be non-charitable in *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315; [1960] ALR 184. Similarly, trusts for the employees of a company and their relatives are also non-charitable: *Davies v Perpetual Trustee Co Ltd* [1959] AC 439; [1959] 2 All ER 128. See also *Oppenheim*.

However trusts for members of the armed services and their families appear to be an exception to this principle: *Downing v Federal Commissioner of Taxation* (1971) 125 CLR 185.

(c) Of what kind is the disposition to Tracey and is it effective?

This disposition is a mere hybrid power of appointment. The disposition is a mere power because there is no obligation to exercise the power. This is indicated by the words 'may,' and 'absolute discretion'. Additionally, the disposition contains a gift in contemplation of default, which is the hallmark of

a mere power. The power is hybrid because the donee is able to choose anyone as the beneficiary of the power, apart from a named group of persons. Note also that because the disposition contains a gift over it satisfies the rule against delegation of testamentary power (*Tatham v Huxtable*). *Tatham* should be discussed at length and it should also be noted that *Tatham* has now been repealed by the *Succession Act 2006*.

(d) Will the gift to Tom be effective?

This question concerns a half-secret trust, as the testator has indicated that the donee is not to hold the property beneficially. To be binding the trust must satisfy the three requirements of intention, communication and acceptance: *Ledgerwood v Perpetual Trustee Co Ltd* (1997) 41 NSWLR 532 at 535, per Young J.

Given the statement made by David, there is no controversy that a trust was intended. Further circumstantial evidence could be led if necessary to prove intention on the balance of probabilities: *Voges v Monaghan* (1954) 94 CLR 231.

A problem might arise in relation to communication, given that David did not speak with Anthony regarding the trust until 17 years after the will was made. Older authority suggested that communication needed to occur before or at the time of the will for a half secret to be valid: *Guest v Webb* [1965] VR 427. However, in *Ledgerwood v Perpetual Trustee Co Ltd* (1997) 41 NSWLR 532, it was held that communication could occur at any time until death. It is of no relevance that the terms of the trust were not communicated until after death: *Re Boyes* (1884) 26 Ch D 531.

Anthony has accepted the trust by nodding. Express acceptance of the obligations are not necessary: *Ottaway v Norman* [1972] Ch 698; [1971] 3 All ER 1325. A valid secret trust has therefore been created.

QUESTION 5 (25 marks)

Rowena is a prominent real estate agent in Campbelltown. Silvester is a developer who has plans approved by the local council to build a block of four town-houses on one of the few parcels of land in Campbelltown zoned for such purposes. Due to a cash-flow problem, Silvester decided to sell two of the town-houses “off the plan” before construction had commenced. Silvester engaged Rowena to find buyers for these two town-houses. After discussions between Rowena and Silvester on the question of a sale price, a figure of \$150,000 per town-house was agreed.

Rowena advertised the sale in the local press and was approached by Zelda. Zelda, who had only \$150,000 to invest, was interested in purchasing one town-house, but only if the town-house was likely to appreciate by at least 25% by the time it was actually built. Zelda instructed Rowena to make enquiries along these lines. Rowena discovered that once completed, the town-houses would each fetch \$225,000. She further discovered that \$170,000 each was the then current market value of the proposed town-houses. Rowena advised Zelda of the results of her enquiries, and Zelda immediately contracted to buy one town-house for \$150,000.

Rowena, with Zelda’s consent, also contacted an old friend Walter. Walter is a retired politician who was seeking to invest his superannuation payout. He had asked Rowena to keep an eye open for a “good deal” if one came along. Rowena told Walter:

I have a town-house for sale “off the plan” for \$150,000 which by the time it is built will fetch \$225,000 on the open market.

Walter immediately contracted to purchase the second town-house from Silvester.

Rowena did not at any time inform Silvester of the information she discovered as a result of the enquiries pursued on behalf of Zelda.

Contracts for both sales were completed a few days after Silvester completed the building of the town-houses. Silvester has now discovered everything that happened and feels terribly cheated.

(a) Define what a ‘fiduciary relationship’ is.

Students should have gone through the definitions in *Hospital Products* and the *UDC v Brian* cases. The traditional categories should have been discussed.

(b) Who owes fiduciary relationships in this question and to whom? Why?

Rowena is Silvester's agent so fall into that category of fiduciary relationship. There are no other relationships present.

(c) Has Silvester any claim and /or remedy in equity for what Rowena has done?

There has been a clear breach by Rowena acting in a double character and withholding information. The only relevant remedy is equitable compensation. The cost of reselling the properties would not justify the cancellation of the contracts and its unlikely that it would be fraud in any case under *Torrens: Farah*. No does an account of profits work as a remedy as Rowena would have actually sustained a small loss from her breach. Compensation of the price difference is the only relevant remedy.

QUESTION 6 (25 marks)

The facts in this question occur in NSW.

Colin was a busy industrialist who was involved in refinancing of small to medium sized businesses. He was in a de facto relationship with Belinda, who also ran her own finance business. They had bought a house together 5 years ago but the house had been put into Belinda's name solely as Colin was worried about what would happen if he ever went bankrupt. Colin had provided 50% of the purchase price. Colin and Belinda never made any capital contributions and were able to buy the house without borrowing, so there was no mortgage to pay off.

Colin also had a son named Roger, who was of school age. Roger's mum, Loane, had been a former girlfriend of Colin's but they were no longer romantically involved. Belinda did not know that Roger was Colin's son.

In an effort to save for Roger's future, Colin opened a joint bank account in his and Roger's names and made regular contributions to it. Belinda did not know about the account.

Colin died on the 1 January 2005, from a recurring cancer that he fought for many years. One month before he died he made a loan of \$100,000 to Gilbert, a newsagent who ran a newsagency at Windang. The purpose of the loan was set out in a letter to Gilbert which read:

This sum is lent to you on the following conditions:

- (a) It is repayable on demand,
- (b) It will bear interest until repayment of 10% per annum, and,
- (c) It is to be used only for the purposes of discharging your indebtedness to your two largest creditors.

The sum of money was deposited in an account to which Gilbert was a signatory. The account was called the 'Gilbert creditor trust a/c'.

When Colin died his will appointed Don (his best mate who knew about Roger) as executor and trustee. The will stated that Colin's share in the house should go to Roger. It left everything else to Belinda. When Belinda confronted Don about the will, Don told her about Colin being Roger's father. She was extremely upset. She became enraged when she discovered the bank account Colin had set up for Roger's future.

- (a) Does Belinda have the right to inherit the entire Bank account in Colin's and Roger's names?

This is a resulting trust question. Resulting trusts can be applied to bank accounts: *Russell v Scott*. Even though Roger made no contributions there is a presumption of advancement which counteracts the presumption of resulting trust in Colin's favour. As such Roger gets to keep the half in his

name. He may also get to keep the other half if the account was held in a joint tenancy (due to the right of survivorship), but there is no evidence of what was intended so the statutory presumption in favour of tenancy in common will probably apply.

(b) Did Colin have any interest in the house and can Belinda challenge the disposition of Colin's share in the house to Roger? (7 marks)

This is similar to part a and is about resulting trusts. There is no presumption of advancement in favour of Belinda given the defacto relationship does not give rise to the presumption: *Calverly v Green*. There are no constructive trust issues in that no post-acquisition contributions were made by Belinda. She holds half of the house on trust for Colin which goes to Roger.

(c) After Colin's death Gilbert was bankrupted. The funds were still in the bank account. Will Belinda (as the beneficiary of Colin's will), Gilbert's two largest creditors, or Gilbert's trustee in bankruptcy get the money?

This is a Quistclose trust question. This question is obviously based on Quistclose and deals with the debt-trust distinction. The loan has an initial purpose which fails hence the initial trust for the creditors fails. A secondary trust is created with the funds being held on trust for Colin. The bank holds this money on trust and the funds should not be made available to the trustee in bankruptcy.

Interestingly the courts have not found that the primary trust gives the right to the creditors. If the Quistclose trust is meant to be an express trust with two limbs then why don't the creditors get it? Lord Millet's solution is to call the trust a resulting trust but this has been rejected by the NSW Court of Appeal in *Salvo v New Tel Ltd*